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MICHAEL RODAK, J

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1326

DONALD BUFORD, et al.,
Petitioners,

v.

THE SOUTHEAST DUBOIS COUNTY SCHOOL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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The petitioners:

Donald Buford, Charles A. Roll, Noel Andry Herbert C. McKinney, Clyde Andry, Edward Stroud, Shirley D. Stroud, Charles Ridenour, Arvel Andry, Edw. Dillard, Violet Dillard, Ada Ford, Leafa Andry, Mary M. Dooley, Riley D. Huff, Margaret Huff, Thomas Van Winkle, Lloyd A. Wright, Sr., Eithel Wright, Charles L. Morgan, Lulabelle Morgan, Carolyn King, Clyde

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Kellems, Carl O. Steffen, Frances M. Steffen, Virginia Clark, Oather Garland, Norma Harmon, and Pearl Linthicum,

respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 25, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Indiana.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 25, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). (No petition for rehearing was filed.)

QUESTIONS PRESENTED

1. Whether petitioner's Protestant children have a First Amendment right to attend a purely public school, or whether they must attend a school public in name, but leased from the Roman Catholic Church, located in a Roman Catholic enclave, governed by an all Catholic school board and superintendent, instructed by some members of Catholic religious orders, instructed with a differentiation based upon religion, with a school library shelved with Catholic books and periodicals, and with an atmosphere of religious discrimination and hostility.

2. Whether First Amendment rights must yield to such considerations as the comparative quality of school facilities.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, 1st Amendment, provides in its relevant parts:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

STATEMENT OF THE CASE

This was an action to enjoin the closing of a public high school, on First Amendment grounds, alleging that the high school closed was a purely public one, but that the school which petitioners' Protestant children were now forced to attend was Roman Catholic dominated, oriented, and influenced. On August 24, 1971, the petitioners filed their complaint for an injunction in the United States District Court for the Southern District of Indiana. Three days later petitioners filed a petition for a preliminary injunction. On September 15, 1971, by counsel, the respondent filed its answer asserting three defenses: Laches; a denial of the essential allegations of petitioners' complaint; and that, other than the First Amendment issue raised by the complaint, any other issue therein was the subject of a pending state court action. On September 16, 1971, a hearing was held on petitioners' request for a preliminary injunction. At the conclusion of this hearing, parties agreed that the trial on the merits should be advanced and consolidated with that hearing, and the Court so ordered. The action was brought against the School Corporation and not individuals, but no objection was raised to any jurisdictional defect, and the Court proceeded to determine the First Amendment issue. The trial Court denied the petitioners' application for injunction.

The facts material to the consideration of the questions presented may be summarized thus: Birdseye is a small Indiana town, with everyone—but two families—of the Protestant faith. R. 80. Ferdinand is another small Indiana town in which everyone is of the Catholic faith. R. 80-81. Prior to the beginning of the Fall School Term of 1971, Birdseye had its own high school with an enrollment of 104 students. R. 159. This school building is still in use for certain educational purposes. R. 157. The respondent school corporation is purchasing the former Catholic High School building at Ferdinand from the Catholic Diocese of Evansville, Indiana, under a lease-purchase agreement. R. 10, 245. Starting with the Fall, 1971, term of school, the former Birdseye High School students are being transported to the former Catholic School at Ferdinand. R. 158-159. The subject school building is owned by the Catholic Diocese of Evansville, Indiana, subject to a lease-purchase agreement with the respondent. R. 10, 245. It was formerly a Catholic school. The physical surroundings of the subject school are those which lend themselves to the appearance of a Catholic enclave. R. 86, 89. There are religious crosses on some of the buildings adapted to educational purposes by the respondent school corporation. R. 114. There are also pictures with a religious theme in some of the classrooms. R. 116. The entire membership of the respondent school corporation is of the Roman Catholic faith. R. 87. The school superintendent of the respondent is a Roman Catholic. R. 87. This school superintendent maintains a *laissez faire* attitude about the religious apparel of his Catholic teachers, R. 183; religious plaques or insignia on school structures, R. 172; the prior attendance of students at mass, R. 165, 167; and the sale of religious workbooks by schools in his jurisdiction, R. 162, 181, 195. There are six full-time and two part-time Catholic nuns on the faculty of twenty-nine at the subject school. R. 172. Sixteen of the teachers, including the nuns, are Roman

Catholic, and twelve are non-Catholic. R. 178. In the entire jurisdiction of respondent, twenty-seven of the seventy-six teachers are nuns. R. 131, 161. The librarian of the subject school is a nun. R. 130, 243. Some of the nuns at the subject school wore the "veil" and other religious apparel, prefer to be, and are, addressed as "sister" while teaching class. R. 105, 131, 144. Catholic encyclopedias, books and periodicals are in the subject school library. R. 130-132. The library has twenty Catholic periodicals but none from any other religious denomination, R. 242-243, although it is maintained by the school librarian that if publications of other faiths were requested they would be provided. R. 243. The history of schools operated by the respondent is replete with examples of religious instruction, R. 138, 139, 143; the saying of mass before school, R. 197-199; and the sale of religious workbooks in the schools. R. 162, 181, 196, 197. But, at the present time, religious instruction and mass have been discontinued in the schools under the respondent school corporation's jurisdiction, and no religious instruction has been given in the subject school since it has come under the control of the respondent. R. 186. One of the teachers of the Catholic faith, who is a nun, did not know whether she could avoid exposing or teaching her religious views to the students. R. 227. A conclusion by a member of the faculty, who was a nun, was that it would stand to reason that much of the teaching philosophy in the school would reflect Catholic influence and direction. R. 237. (It is not clear whether she refers to books on Philosophy or the school's attitude, however.) In another instance a teacher at the subject school referred to the Catholic Church as the Christian Church. R. 112. Petitioners' children have dropped out of the subject school, R. 99; have been sent elsewhere at great expense, R. 123; or will not be sent there when of sufficient age, R. 86, 150, because of the fear of Catholic indoctrination. Inquiry or reference is made by teachers concerning the religion of

petitioners' children. R. 103, 104, 107, 116-117. Protestant children of petitioners feel discrimination from the teachers who are nuns, R. 120, and Catholic students. R. 112-113. The circumstances at the subject school will tend to cause political affiliation based upon religious belief. R. 86-87. Many of the petitioners actually believe, or consider, the subject school to be a Catholic one. R. 99, 133, 150. The history of the respondent's operation of its schools, in the manner they are operating the subject school, reveals that children are indoctrinated with the Catholic faith. R. 149.

The respondent is further subject to control by the Catholic Church in that, in addition to its lease-purchase of the subject school, it rents thirty-two other classrooms from the Catholic diocese on an annual basis. Other than the Birdseye school, a two-room building at Ferdinand and a three-room building at Schnellville, all of the respondent's classrooms are owned by the Catholic Church. The respondent's superintendent has no alternate plan if the Catholic diocese refuses to rent these classrooms for another year. R. 154-156.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Decisions of This Court as to What Construction Should Be Given to the First Amendment.

It is well settled that the First Amendment is applicable to state action, and more specifically, to School Board resolutions. **Barnette v. West Virginia State Board of Education** (1943), 319 U.S. 624, 63 S.Ct. 1178, 87 L.ed. 1628. That proposition being beyond dispute, it is clear that the decision below is in direct conflict with decisions of this Court on First Amendment construction. A very brief review of Religion Clause cases reveals the standards of this Court.

The Religion Clauses command that there should be "no law respecting an establishment of religion", the word "respecting" holding special significance, as "(a) law may be one 'respecting' the forbidden objective while falling short of its total realization." **Lemon et al. v. Kurtzman** (1971), —— U.S. ——, 91 S.Ct. 2105, 2111, 29 L.ed.2d 745. The Religion Clauses were intended to afford protection against "sponsorship, financial support, and active involvement of the sovereign in religious activity." **Lemon et al. v. Kurtzman**, *supra*. That case also prohibits situations where the "potential for impermissible fostering of religion is present", and, situations where state assistance to religion will entail responsive political activity.

This Court has enunciated "the rule of neutrality", holding that "(i)n the relationship between man and religion, the State is firmly committed to a position of neutrality." **School District of Abington Tp., Pennsylvania v. Schempp** (1963), 374 U.S. 203, 277, 83 S.Ct. 1560, 10 L.ed. 2d 844; **Walz v. Tax Commissioners of City of New**

York (1970), 397 U.S. 664, 670, 90 S.Ct. 1409, 25 L.ed. 2d 697. Even "subtle departures from neutrality, 'religious gerrymanders' ", are prohibited. **Gillette v. U.S.** (1971), 401 U.S. 437, 453, 91 S.Ct. 828, 28 L.ed. 2d 168.

Another guideline from this Court is also found in **Walz v. Tax Commissioners of City of New York**, *supra*, which can be characterized as "avoidance of excessive entanglements" (397 U.S. at 671).

The facts in the case at bar present multiple departures from this required neutrality, and the entanglements are grossly excessive. These facts (at bar) do not fall squarely within the precedent of any one case, but in the aggregate they present a clear picture of virtual oppression of a religious minority. They show a fear that petitioners' Protestant children are being forced to attend a school which they believe to be a Roman Catholic one. R. 133. That, obviously, is a subjective reaction to petitioners' plight, and many objective reasons exist for granting them relief. However, petitioners urge that subjective views cannot be ignored in Religion Clause cases, because of the very nature of the subject we are considering—one's **beliefs.**

The Court of Appeals acknowledged and recited some of the facts which, as that Court stated it, buttressed petitioners' concern. It then went on to comment upon the trial Court's findings concerning the harmonious consolidation of the Birdseye student body with the new, predominantly Roman Catholic student body. The trial Court seemed impressed because the consolidated student body had agreed upon new school colors, a new school song and a new mascot! The trial Court noted that "no • • • parent objected or complained to school officials to this consolidation in any way." This last remark flies in the face of the fact that there was a suit pending in a state Court of Indiana resisting the consolidation, R. 38, as well as the within action with approximately 140 petitioners.

(Birdseye High School had 104 students its last year of full operation. R. 159).

The other fact which impressed the Court of Appeals was the comparative quality of the Birdseye school facilities with those of the new school, the Court characterizing the former as "outdated".

The theory of this case from its inception, acknowledged by the Court and both sides, has been one of First Amendment violation. That being undisputed, comparative quality of school facilities and harmonious selection of a school mascot are totally irrelevant.

First Amendment rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." **West Virginia School Bd. of Ed. v. Barnette** (1943), 319 U.S. 624, 63 S.Ct. 1178, 87 L.ed. 1171. And, although this Court was speaking of other First Amendment rights, it seems clear that the language in the case of **Thomas v. Collins** (1944), 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.ed. 430, is intended to apply to religious liberties. There, this Court held that "any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. * * * Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." See also **Sherbert v. Verner** (1963), 374 U.S. 398, 407, 83 S.Ct. 1790, 10 L.ed. 2d 965.

Was the Birdseye school building about to collapse and kill or maim the student body? Of it the trial Court said:

> "Since they conducted a high school there last year, I assume it wouldn't be insuperable if the Court would order it." R. 245.

If the reason for the trial and appellate court's decision below can be briefly summarized, it appears to be that

petitioners should correct their provincial attitude. Petitioners believe it may be said, without cynicism, that the Religion Clauses presuppose a certain provinciality. The lower courts also urge the two factions to cooperate. Alas, history does not lend hope for the heeding of this admonition. See **Engel v. Vitale** (1962), 370 U.S. 421, 432, 82 S.Ct. 1261, 8. L.ed.2d 601, and continuing news stories from Belfast, Northern Ireland.

Petitioners have now arrived at the most crucial aspect of this inquiry: What is the most precise point of conflict between the lower Court's decision and a decision of this Court. Brief quotations graphically demonstrate this.

The Court of Appeals says:

> "* * * we are persuaded that the appropriate remedy in this case lies * * * in the direction of unambiguous and vigilant enforcement of the commands of the First Amendment at the modern, integrated school in Ferdinand. * * *"

This Court, in **Lemon v. Kurtzman** (1971), — U.S. —, 91 S.Ct. 2105, 29 L.ed.2d 745, says:

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church."

The solution of the Court of Appeals is the very thing prohibited by this Court! And who would maintain the vigilance recommended by the Court of Appeals? The

unsophisticated student body, not *sui juris* for any other purpose? The petitioners, who must earn their bread and in any case cannot attend school with their children? Some sort of heretofore unknown Federal referee? Lemon has already answered these questions, of course.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted

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